
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CIVIL

CITATION : LEE -v- DEPARTMENT OF JUSTICE [2020] WASC
105

CORAM : ARCHER J

HEARD : 11 MARCH 2020

DELIVERED : 31 MARCH 2020

FILE NO/S : GDA 11 of 2019

BETWEEN : JEFFREY STEWART LEE
Appellant

AND

DEPARTMENT OF JUSTICE
Respondent

ON APPEAL FROM:

Jurisdiction : INFORMATION COMMISSIONER OF WESTERN
AUSTRALIA

Coram : ACTING COMMISSIONER C FLETCHER

File Number : F2018299

Catchwords:

Freedom of information - Reasonableness of Commissioner's decision - Turns
on its own facts

Legislation:

Freedom of Information Act 1992 (WA)

Result:

Appeal dismissed

Category: B

Representation:

Counsel:

Appellant : D W Thompson
Respondent : J D Berson

Solicitors:

Appellant : Bayview Legal
Respondent : State Solicitor for Western Australia

Case(s) referred to in decision(s):

A v Corruption and Crime Commissioner [2013] WASCA 288
Commissioner for Consumer Protection v Carey [2014] WASCA 7
Department of State Development v Latro Lawyers [2016] WASC 108
Lee v Department of Health [2020] WASC 103
Minister for Immigration and Border Protection v Eden [2016] FCAFC 28;
(2016) 240 FCR 158
Minister for Immigration and Citizenship v Li [2013] HCA 18; (2013) 249 CLR
332
Pearlman v The University of Western Australia [2018] WASC 245
Western Australian Planning Commission v The Board of Valuers [2018]
WASCA 145

ARCHER J:

Background

1 The appellant, Mr Lee, appeals against a decision of the Acting Information Commissioner (Commissioner) to cease dealing with a complaint under the *Freedom of Information Act 1992* (WA) (the Act). The Commissioner did so on the ground that it was lacking in substance pursuant to s 67(1)(b) of the Act.

2 Mr Lee is the director of a company (Kingsfield) which was convicted of an offence under the *Food Act 2008* (WA) and fined \$2,500 plus costs on 20 April 2015. The fine and costs were paid in full on 4 June 2015.¹

3 Mr Lee has made a number of applications under the Act for access to documents in connection with this offence. This appeal concerns an application he made on 14 June 2018 to the respondent (Department). In that application, Mr Lee sought access to documents relating to the enforcement and collection of the fine imposed on Kingsfield (Access Application). In effect, Mr Lee was seeking any such documents that might be held by the Fines Enforcement Registry (FER).²

4 The Department failed to deal with the Access Application in the timeframes provided by the Act and was deemed to have refused access. Mr Lee applied to the Commissioner for an external review of the Department's deemed decision.

5 Section 65(1)(d) of the Act provides that a complaint may be made against an agency's decision to refuse access to a document. As the Department was deemed to have decided to refuse access, the Commissioner decided to deal with Mr Lee's application as a complaint under s 65(1)(d).

6 The Commissioner required the Department to produce to her copies of each of the documents that fell within the scope of Mr Lee's

¹ See the materials filed with the appeal notice (Materials) page 37. This was also an agreed fact - see the Respondent's Responsive Chronology filed 19 February 2020, with which Mr Lee relevantly agreed (see ts 7 and 26).

² This was accepted by Mr Lee - see ts 23.

Access Application and the Department's Freedom of Information file, and to complete the decision-making process.³

7 The Department provided its decision on 26 October 2018 (Department's Decision).⁴ The Department granted access to two documents relating to the payment of the fine (Payment Documents), but refused access to documents concerning the enforcement of the fine on the grounds that no such records existed.⁵ Under s 26 of the Act, an agency may advise an applicant that it is not possible to give access to a document if all reasonable steps have been taken to find the document, and the agency is satisfied it cannot be found or does not exist.

8 In the Department's Decision, the Department said:

- (a) the fine and costs were referred to the FER by the Fremantle Court on 20 April 2015 (the same day as they were imposed);
- (b) the fine had been paid in full;
- (c) enforcement action by the FER for a fine of this type would only commence at the request of the prosecuting authority (I will refer to this statement of the Department as the 'Process Statement'); and
- (d) no request had been made by the prosecuting authority for enforcement.

9 The Department said that, as a result, no documents relating to enforcement of the fine were created by the FER.

10 The materials before the Commissioner did not identify the source of the Department's statement that no request had been made by the prosecuting authority (which was the Health Department) for enforcement. However, it is likely that the source was the FER rather than the Health Department.

11 First, the only source expressly identified in the Department's Decision was the FER; it was identified as the source of information about the computer system. Second, from the nature of the other information in the Department's Decision, the FER was most likely the source of that other information. Third, after the Department's Decision

³ Materials page 32.

⁴ Materials page 34.

⁵ Materials page 34.

had been made, there was email correspondence between Mr Lee and an officer of the 'Information Release and Litigation Management' section of the Department, Ms Backshall. It appears that Ms Backshall obtained the information she provided in those emails from the FER.⁶

12 The Payment Documents provided by the Department were two screenshots which showed the payment of the fine. On one, it was recorded that the fine had been 'Paid in Full', but there was also an entry that read 'Re-start enforcement process 02 Oct 2015 07:32 PM' (the Entry).

13 Mr Lee queried the Entry with Ms Backshall.⁷ Ms Backshall advised Mr Lee that she had been provided with the following information from the FER about the Entry:⁸

The charge was re-listed to a hearing for the 02 Oct 2015 which was vacated on the 02 Oct 2015 with the reason 'by consent' so I'd say this would trigger an update to the case, but because [the fine] was already paid it remained at Paid in Full status.

14 These communications were among the materials before the Commissioner.

15 In this appeal, it was an agreed fact that consent orders had been signed, vacating a listing on 2 October 2015. Mr Lee asserts that the consent orders filed on that date discontinued an appeal lodged by Kingsfield against the magistrate's decision. However, it appears that the Commissioner was not aware of this at the time of making her decision in this matter. If she had been aware of it, she may have considered it provided further support for the FER's supposition.⁹

16 After receiving the Department's Decision, Mr Lee made a complaint to the Commissioner. He contended that the Department had not found all the documents within the scope of the Access Application, nor had it taken all reasonable steps to do so.¹⁰

⁶ See, for example, the Materials page 51.

⁷ Materials page 52.

⁸ Materials page 51 (email on 26 October 2018 and email on 29 October 2018).

⁹ Under s 101B of the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) (Enforcement Act), if an offender is granted leave to appeal against a fine or a decision giving rise to a fine, the obligation to pay the fine is effectively suspended. If an appeal is discontinued, the obligation to pay is revived. See also s 32 of the Enforcement Act.

¹⁰ Materials page 54.

Preliminary View

17 On 18 June 2019, the Commissioner sent Mr Lee a letter setting out her preliminary view (Preliminary View Notice).¹¹ The Commissioner advised that her preliminary view was that the Department's Decision (to refuse Mr Lee access to further documents on the basis that further documents could not be found, or did not exist) was justified.¹²

18 In the Preliminary View Notice, the Commissioner wrote:¹³

I consider that, in dealing with section 26, the following questions must be answered. First, whether there are reasonable grounds to believe that the additional documents exist or should exist, and second, whether the additional documents are, or should be, held by the agency. Where those questions are answered in the affirmative, the next question is whether the agency has taken all reasonable steps to find the additional documents.

19 The Commissioner set out Mr Lee's submissions, which, among other things, referred to the Entry. The Commissioner also set out what had been recorded in the Department's Decision, including that no request by the prosecuting authority was made for enforcement of the fine.¹⁴

20 The Commissioner also set out the information that her officer had received after attending the FER:¹⁵

- The FER is a part of Court and Tribunal Services (the **CTS**) of the agency. The FER is responsible for the enforcement of all fines issued in the Supreme, District and Magistrates Court jurisdictions in Western Australia and for infringements issued by approved Prosecuting Authorities in Western Australia (Commonwealth matters prosecuted through the Court are received by FER as fines).
- The FER is a database forming part of the Integrated Court Management System.
- Court fines are fines which a judge or magistrate has ordered an individual or a company to pay. A court fine is registered with the FER after it has been given to the individual (or company). The FER has the jurisdiction to enforce automatically certain

¹¹ Materials page 68.

¹² Materials page 68.

¹³ Materials page 70.

¹⁴ Materials page 71.

¹⁵ Materials pages 71 - 72.

finer if payment is not received by the due date (usually 28 days after the date of the notice). In those circumstances, a Notice of Intention to Enforce is automatically issued.

- In certain circumstances, the prosecuting authority (such as WAPOL, Electoral Commission or Health Department, (as in this case) has to initiate the enforcement action. In these circumstances, the FER does not enforce the payment of the fine or infringement automatically.

21 The Commissioner further wrote:¹⁶

In the circumstances of this matter, I understand that you paid the amount of the fine and costs imposed by the court on Kingsfield Holdings in full, on 4 June 2015. Accordingly, no request to enforce payment of the fine was received from the Department of Health because the fine was paid by you, on behalf of Kingsfield Holdings, in full. The agency submits that, on the basis the fine and costs had been paid in full, the matter was concluded.

Having considered all of the material before me including the submissions made by the agency and you, I am not persuaded that there are reasonable grounds to believe that further documents within the scope of your access application exist.

Accordingly, I consider that the decision of the agency to refuse access to those documents on the ground that they either cannot be found or do not exist, is justified. As a result, I do not propose to make further inquiries with the agency or to require the agency to conduct further searches for documents within the scope of your access application.

22 The Commissioner invited Mr Lee to make further submissions if he did not accept her preliminary view.¹⁷

The further submissions and materials

23 Mr Lee provided further submissions and materials.

24 In his further submissions, Mr Lee again referred to the Entry. Mr Lee also included a Subiaco Post article dated 21 July 2018 (Newspaper Article).

Final Decision

25 After receiving the further material and submissions from Mr Lee, the Commissioner decided to stop dealing with the complaint pursuant

¹⁶ Materials page 72.

¹⁷ Materials page 69.

to s 67(1)(b) of the Act on the basis that it was lacking in substance. She provided to Mr Lee a document setting out this decision, and her reasons for it, on 16 August 2019 (Final Decision).¹⁸

26 In the Final Decision, the Commissioner set out Mr Lee's previous submissions and his further submissions, including the reference to the Entry.

27 The Commissioner also referred to the materials that had been provided by Mr Lee, including the Newspaper Article. The Commissioner said the Newspaper Article was not relevant to whether there were reasonable grounds to expect that further documents existed nor whether the agency had taken all reasonable steps to find those documents.

28 The Commissioner said that she remained of the view, expressed in her Preliminary View Notice, that the Department's Decision was justified. She said that, for the reasons stated in the Preliminary View Notice and in the Final Decision, she had decided to stop dealing with the complaint under s 67(1)(b) of the Act on the basis that it was lacking in substance.

The appeal

29 Mr Lee filed an appeal notice in this court on 6 September 2019. The essence of his complaints were that the Commissioner erred in law and her Final Decision was unreasonable in that she failed to take into account relevant considerations (ground 2) and also took into account an irrelevant consideration (ground 3).

30 Ground 1 did not add anything to those grounds. During the hearing, counsel for Mr Lee accepted it could be ignored.¹⁹

31 Counsel for Mr Lee clarified that the grounds of appeal sought only to allege unreasonableness,²⁰ and that it was the *outcome* that was alleged to be unreasonable.²¹

32 The particulars to ground 2 were, as Mr Lee's counsel conceded, more statements of arguments and conclusions than the identification of

¹⁸ Materials page 109.

¹⁹ ts 9.

²⁰ Appellant's Outline of Submissions dated 5 February 2020 (Appellant's Submissions) [30].

²¹ ts 10 - 11. Unreasonableness on the basis of outcome is explained in *Minister for Immigration and Border Protection v Eden* [2016] FCAFC 28; (2016) 240 FCR 158, relevant passages from which are set out below under the heading 'Legal unreasonableness'.

relevant considerations.²² Counsel sought, and was granted, leave to amend ground 2 as follows:

2. The Commissioner erred in law in her Formal Decision as it was unreasonable and/or failed to take into account relevant considerations in that the Commissioner failed to consider or give proper consideration to:
 - (a) the nature and extent of any searches actually undertaken by the respondent agency; and/or
 - (b) the notation on the screen capture produced by the respondent agency on 26 October 2018 reading 'Re - start enforcement process 02 Oct 2015 07:32 PM' taken together with material before the Commissioner relevant to that notation, namely:
 - (i) the statement made in the respondent's access decision dated 26 October 2018, namely, 'Enforcement action by FER for a fine of this type would only commence at the request of the Prosecuting Authority' [which I refer to as the 'Process Statement']; and
 - (ii) the copy of the Subiaco Post article of 21 July 2018 supplied by the appellant to the Commissioner.

33 Counsel for Mr Lee further clarified that ground 2(b) intended to assert that the Commissioner acted unreasonably in failing to have regard to the Entry, in the context of the Department's Process Statement and the Newspaper Article.²³

34 Ground 3 alleged:

3. The Commissioner took into account irrelevant considerations being:
 - (a) No request was made to enforce the fine because the fine was paid when in fact there was a request to start enforcement notwithstanding the fine had in fact been paid.

35 Mr Lee submits that the fact of payment was irrelevant to the question of whether an enforcement request was made and the

²² Appellant's Submissions [36].

²³ ts 29 - 30.

Commissioner therefore acted unreasonably in giving weight to this fact.²⁴

Application to adduce evidence

36 In these proceedings, Mr Lee made an application for leave to adduce evidence that was not before the Commissioner. I directed that the application would be dealt with at the same time as the appeal.

37 At the commencement of the hearing, I asked counsel for Mr Lee whether he intended to submit that I had the power to accept any such evidence in light of the Court of Appeal's decision in *Commissioner for Consumer Protection v Carey*.²⁵ Counsel for Mr Lee advised that he did not press the application to adduce additional evidence.²⁶

The issues

38 The issues can be summarised as follows:

1. In relation to ground 2:
 - (a) Did the Commissioner fail to have regard to the nature and extent of any searches actually undertaken by the Department?
 - (b) If so, was this unreasonable?
 - (c) Did the Commissioner fail to have regard to the Entry, in the context of the Department's Process Statement and the Newspaper Article?
 - (d) If so, was this unreasonable?
2. In relation to ground 3:
 - (a) Was it irrelevant that the fine and costs levied against Kingsfield had been paid before the date upon which the Entry was (on its face) created?
 - (b) If so, did the Commissioner act unreasonably in giving weight to this fact?

²⁴ Appellant's Submissions [47].

²⁵ *Commissioner for Consumer Protection v Carey* [2014] WASCA 7. This is discussed in more detail under the heading 'Appeals from decisions of the Commissioner'.

²⁶ ts 4 - 5.

39 Before dealing with the issues, I will set out the relevant legal principles.

The relevant legal principles

40 In *Lee v Department of Health*,²⁷ I summarised the legal principles that applied to appeals of this nature. Much of what follows in this section reproduces that summary.

The Act

41 The long title of the Act provides that, among other things, it is an Act to provide for public access to documents. The objects of the Act are to enable the public to participate more effectively in governing the State, and make the persons and bodies that are responsible for State and local government more accountable to the public.²⁸ One of the means by which those objects are to be achieved is by creating a general right of access to State and local government documents.²⁹

42 Section 10(1) of the Act gives a person a right to access the documents of an agency subject to and in accordance with the Act. An agency is a minister, a public body or office.³⁰ The Department is an agency.

43 By s 10(2) of the Act, a person's right to access is not affected by the person's reasons for wanting access.

44 As s 10 foreshadows, there are provisions in the Act which condition the general right of access. Relevantly to this appeal, s 26 is one of those provisions.³¹

45 Under s 26 of the Act, an agency may advise an applicant that it is not possible to give access to a document if all reasonable steps have been taken to find the document, and the agency is satisfied it cannot be found or does not exist.

46 Under s 65(1)(d) of the Act, a complaint may be made against an agency's decision to refuse access to a document. An advice under s 26 is deemed to be a decision to refuse access to the document. It may

²⁷ *Lee v Department of Health* [2020] WASC 103.

²⁸ Section 3(1) of the Act.

²⁹ Section 3(2)(a) of the Act.

³⁰ Glossary in the Act.

³¹ Other examples are the provisions dealing with exempt documents and s 20.

therefore be the subject of a complaint to the Commissioner under s 65(1)(d) of the Act.

47 Under s 67(1)(b), at any time after receiving a complaint, the Commissioner may decide to stop dealing with the complaint because it is frivolous, vexatious, misconceived or lacking in substance. If the Commissioner so decides, the Commissioner is required to inform the complainant in writing of the decision, and provide the reasons for the decision.³²

48 Section 70 sets out the procedure for dealing with a complaint. It relevantly provides:

Complaint, procedure for dealing with

- (1) In order to deal with a complaint the Commissioner may obtain information from such persons and sources, and make such investigations and inquiries, as the Commissioner thinks fit.
- (2) Proceedings are to be conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act and a proper consideration of the matters before the Commissioner permit, and the Commissioner is not bound by rules of evidence.
- (3) The Commissioner has to ensure that the parties to a complaint are given a reasonable opportunity to make submissions to the Commissioner.
- (4) The Commissioner may determine the procedure for investigating and dealing with complaints and give any necessary directions as to the conduct of the proceedings.
- (5) For example, the Commissioner may -
 - (a) deal with the complaint without holding formal proceedings or hearings;

...

Appeals from decisions of the Commissioner

49 Under s 85(1) of the Act, an appeal lies to the Supreme Court on any question of law arising out of any decision of the Commissioner on a complaint relating to an access application. A decision of the

³² Section 67(2) of the Act.

Commissioner to cease dealing with a complaint pursuant to s 67(1)(b) is such a decision.³³

50 Appeals under s 85 of the Act are in the nature of judicial review.³⁴ However, the questions of law are not confined to jurisdictional errors, and extend to non-jurisdictional questions of law.³⁵

51 Section 87 of the Act lists the appeal court's powers. It provides:

- (1) On the determination of an appeal under section 85(1), (2)(a) or (4) the Supreme Court may by order -
 - (a) confirm the Commissioner's decision; or
 - (b) vary the Commissioner's decision; or
 - (c) set aside the Commissioner's decision and -
 - (i) make a decision in substitution for that decision; or
 - (ii) remit the matter to the Commissioner for reconsideration with any direction or recommendation the Supreme Court thinks fit.
- (2) On the determination of an appeal under section 85(2)(b) the Supreme Court may order that an exemption certificate no longer apply to a document.
- (3) If it is established that a document is an exempt document the Supreme Court does not have power to make a decision to the effect that access is to be given to the document.

52 The powers of the appellate court must be 'exercised with restraint to avoid an appeal on a question of law opening the door to an appeal by way of rehearing. The reasons of an administrative decision-maker are not to be construed minutely and with an eye "keenly attuned to the perception of error" '.³⁶

53 In *Carey*, the Court of Appeal was considering an appeal on a question of law under s 105(2) of the *State Administrative Tribunal Act 2004* (WA) (SAT Act). The court³⁷ held that there was no power to accept additional evidence on such an appeal, referring in particular to

³³ *Pearlman v The University of Western Australia* [2018] WASC 245 [70], [79] - [81].

³⁴ *Department of State Development v Latro Lawyers* [2016] WASC 108 [34].

³⁵ *Carey* [72].

³⁶ *Latro Lawyers* [35].

³⁷ See *Carey* [71] (McLure P, with Murphy JA agreeing), [167] (Buss JA).

s 105(2) and s 105(9) of the SAT Act. Those subsections are in materially the same terms as s 85(1) and s 87(1) of the Act.

54 *Carey* is not distinguishable. Accordingly, the appellate court in an appeal under the Act does not have the power to receive additional evidence that was not before the decision-maker.

Legal unreasonableness

55 In *Minister for Immigration and Border Protection v Eden*,³⁸ the Full Court of the Federal Court summarised the relevant principles (citations omitted):

First, the concept of legal unreasonableness concerns the lawful exercise of power. Legal reasonableness, or an absence of legal unreasonableness, is an essential element in the lawfulness of decision-making.

Second, the Court's task in determining whether a decision is vitiated for legal unreasonableness is strictly supervisory. It does not involve the Court reviewing the merits of the decision under the guise of an evaluation of the decision's reasonableness, or the Court substituting its own view as to how the decision should be exercised for that of the decision maker. Nor does it involve the Court remaking the decision according to its own view of reasonableness.

Third, there are two contexts in which the concept of legal unreasonableness may be employed. The first involves a conclusion after the identification of a recognised species of jurisdictional error in the decision making process, such as failing to have regard to a mandatory consideration, or having regard to an irrelevant consideration. The second involves an 'outcome focused' conclusion without any specific jurisdictional error being identified.

...

Fourth, in assessing whether a particular outcome is unreasonable, it is necessary to bear in mind that within the boundaries of power there is an area of 'decisional freedom' within which a decision-maker has a genuinely free discretion. Within that area, reasonable minds might differ as to the correct decision or outcome, but any decision or outcome within that area is within the bounds of legal reasonableness. Such a decision falls within the range of possible lawful outcomes of the exercise of the power.

³⁸ *Eden* [58] - [60], [62] - [65], cited by Buss P in *Western Australian Planning Commission v The Board of Valuers* [2018] WASCA 145 [172].

Fifth, in order to identify or define the width and boundaries of this area of decisional freedom and the bounds of legal reasonableness, it is necessary to construe the relevant statute. The task of determining whether a decision is legally reasonable or unreasonable involves the evaluation of the nature and quality of the decision by reference to the subject matter, scope and purpose of the relevant statutory power, together with the attendant principles and values of the common law concerning reasonableness in decision-making. The evaluation is also likely to be fact dependant and to require careful attention to the evidence.

Sixth, where reasons for the decision are available, the reasons are likely to provide the focus for the evaluation of whether the decision is legally unreasonable. Where the reasons provide an evident and intelligible justification for the decision, it is unlikely that the decision could be considered to be legally unreasonable. However, an inference or conclusion of legal unreasonableness may be drawn even if no error in the reasons can be identified. In such a case, the court may not be able to comprehend from the reasons how the decision was arrived at, or the justification in the reasons may not be sufficient to outweigh the inference that the decision is otherwise outside the bounds of legal reasonableness or outside the range of possible lawful outcomes.

Seventh, and perhaps most importantly, the evaluation of whether a decision is legally unreasonable should not be approached by way of the application of particular definitions, fixed formulae, categorisations or verbal descriptions. The concept of legal unreasonableness is not amenable to rigidly defined categorisation or precise textural formulary. That said, the consideration of whether a decision is legally unreasonable may be assisted by reference to descriptive expressions that have been used in previous cases to describe the particular qualities of decisions that exceed the limits and boundaries of statutory power. ... The expressions that have been utilised include decisions which are 'plainly unjust', 'arbitrary', 'capricious', 'irrational', 'lacking in evident or intelligible justification', and 'obviously disproportionate'. It must be emphasised again, however, that the task is not an *a priori* definitional exercise. Nor does it involve a 'checklist' exercise. Rather, it involves the Court evaluating the decision with a view to determining whether, having regard to the terms, scope and purpose of the relevant statutory power, the decision possesses one or more of those sorts of qualities such that it falls outside the range of lawful outcomes.

56 It has been observed that the 'requirement of reasonableness is not a vehicle for challenging a decision on the basis that the decision-maker has given insufficient or excessive consideration to some matters or has

made an evaluative judgment with which a court disagrees even though that judgment is rationally open to the decision maker'.³⁹

Analysis

Did the Commissioner fail to have regard to the nature and extent of any searches actually undertaken by the Department? (ground 2(a))

57 Mr Lee submits that the Commissioner failed to have regard to the nature and extent of any searches actually undertaken by the Department.⁴⁰

58 I accept that the Commissioner did not refer to the nature and extent of any searches in her reasons. However, I would not infer from that that she did not have regard to these matters.

59 First, the content of the obligation to give reasons must be assessed in view of the purpose of the requirement to give reasons and in the context of the Act as a whole. In my view, in explaining a conclusion as to whether there were reasonable grounds to believe documents within the scope of an access application existed, it would not be necessary to refer to the nature and extent of searches unless these matters were significant factors in the conclusion. For example, if a commissioner concluded that there were no reasonable grounds to believe documents within the scope of an access application existed because the searches were so comprehensive yet nothing was found, this should be referred to in the commissioner's reasons.

60 Second, the Commissioner was addressing whether there were reasonable grounds to believe that further documents existed. Understandably, her reasons focused on Mr Lee's submissions.

61 Third, the Commissioner was clearly aware that the Department had undertaken some searching and that two documents had been produced as a result.⁴¹ The Commissioner also obtained the Department's FOI file.⁴²

³⁹ *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332 [30] (French CJ), cited in *A v Corruption and Crime Commissioner* [2013] WASCA 288 [123] (Martin CJ & Murphy JA).

⁴⁰ See Appellant's Submissions [40]. The Appellant's Submissions at [39] were withdrawn - see the Appellant's Supplementary Outline of Submissions filed (with leave) 17 March 2020 [2].

⁴¹ In the Preliminary View Notice, the Commissioner referred to the Payment Documents that the Department had found - see Materials page 68.

⁴² See Materials page 69 last paragraph.

62 For these reasons, I am not satisfied that the Commissioner failed to have regard to the nature and extent of the searches undertaken by the Department. I would therefore reject ground 2(a).

63 In any event, even if the Commissioner did fail to have regard to these matters, that would not necessarily mean that her decision was unreasonable in the sense required.

64 In my view, there is an interrelationship between the reasonableness of searches and the likelihood that a document exists. To take a silly example, if a person asked for a document recording the landing of an alien spaceship, the agency would not need to undertake any searches at all to be satisfied that such a document did not exist, and to be entitled to refuse access under s 26. This would not mean that the agency had failed to take all reasonable steps to find the document. It would mean that there were no steps that could be described as reasonable to take. In such a case, it would be open to the Commissioner, acting reasonably, to find that there were no reasonable grounds to believe that further documents existed within the scope of an access application, without first considering the nature and extent of the searches that had been made.

65 Therefore, the question is whether this conclusion would have been open to the Commissioner *in this case*. To succeed on this ground, Mr Lee must establish that it was not.

66 I am not satisfied it would not have been open to the Commissioner. Later, I will discuss the information that the Commissioner had and accepted. In my view, it was open to the Commissioner to conclude, in light of this information, that there were no reasonable grounds to believe that further documents existed within the scope of the Access Application, without first considering the nature and extent of the searches that had been made.

Did the Commissioner fail to have regard to the Entry? (ground 2(b))

67 Mr Lee submits that the Commissioner failed to have regard to the Entry, in the context of the Process Statement⁴³ and the Newspaper Article. Mr Lee submits that the Entry strongly suggests that a request had been made to start enforcement proceedings. Mr Lee further

⁴³ 'Process Statement' is a reference to the Department's statement that the FER does not enforce the payment of a fine in cases of this type unless the prosecuting authority initiates enforcement action.

submits that, if the Process Statement was true, the almost unavoidable inference is that there is a document constituting such a request.⁴⁴

68 In oral submissions, counsel said that he did not put it so highly that the Entry, in that context, necessarily meant that the prosecuting authority had made a request. Rather, his submission was that it meant 'something in the nature of [a] request that the people at the receiving end saw as a request was made'.⁴⁵

69 In the Preliminary View Notice, the Commissioner referred to the Entry and the Process Statement. In the Final Decision, the Commissioner referred to the Entry and the Newspaper Article. The Newspaper Article had been submitted by Mr Lee after the Preliminary View Notice was issued.

70 In both the Preliminary View Notice and the Final Decision, the Commissioner said she had reviewed all of the materials before her.

The Entry

71 I am not satisfied the Commissioner did not have regard to the Entry. She expressly referred to it in both the Preliminary View Notice and the Final Decision. The clear inference from her reasons as a whole is that the Commissioner concluded, *despite* the Entry, that there were no reasonable grounds to believe that enforcement documents existed. That is, she reached this view on the whole of the materials, despite the Entry, not regardless of the Entry.

72 Further, the weight to be given to the information before her was a matter for the Commissioner. Provided that it was open to her to reach the conclusion that she did, unreasonableness in the required sense is not established by asserting she ought to have given more weight to particular information. Rather, it would be necessary to establish that, in light of the Entry, it was not open to her to be unpersuaded that there were reasonable grounds to believe that enforcement documents existed.

73 Mr Lee seeks to do this by contending that, if the Commissioner had given the Entry any 'real' consideration, she could not have failed to conclude that there must have been some other documents.⁴⁶ Mr Lee

⁴⁴ Appellant's Submissions [42].

⁴⁵ See ts 22 - 23 and Appellant's Submissions [42].

⁴⁶ ts 12.

emphasises that the Entry said '*re-start*'.⁴⁷ Mr Lee submits that it was therefore not open to the Commissioner acting reasonably to fail to be persuaded that there were reasonable grounds to believe that enforcement documents existed.

74 I am not satisfied of this. In my view, having regard to the other information before the Commissioner, it was open to her to fail to be persuaded, despite the Entry.

75 In this case, the Commissioner had obtained information, as she was entitled to do.⁴⁸ This included the following:

1. The fine and costs were paid in full on 4 June 2015;
2. The FER does not enforce the payment of a fine in cases of this type unless the prosecuting authority initiates enforcement action. (I refer to this statement of the Department's as the 'Process Statement'.)
3. No request for enforcement was made by the prosecuting authority.
4. The Entry ('Re-start enforcement process 02 Oct 2015 07:32 PM') appeared on one of the Payment Documents. On the same document, it was recorded that the fine had been 'Paid in Full'.
5. There had been a court listing on 2 October 2015, which had been vacated by consent.
6. The FER had surmised, in effect, that the Entry had been automatically made by the system when the court listing was vacated.

76 The information that no request for enforcement had been made came from the Department. Given s 70(1) and (2) of the Act, the Commissioner was entitled, albeit not obliged, to accept that this was a fact.⁴⁹

77 Mr Lee accepted that the Commissioner was entitled to conclude that the prosecuting authority had not made a request for enforcement. However, he submitted that this did not eliminate the possibility that a

⁴⁷ ts 14.

⁴⁸ See s 70(1) of the Act, reproduced earlier.

⁴⁹ This was conceded by Mr Lee - see ts 27 - 28.

request was received 'from somewhere [else] or something [was received] that the FER took to be a request'.⁵⁰ As noted earlier, counsel submitted that the Entry necessarily meant that 'something in the nature of [a] request that the people at the receiving end saw as a request was made'. Counsel did not identify anything other than a request from the prosecuting authority that could be seen in such terms, but said it might have been an accident.⁵¹

78 I accept that the fact the prosecuting authority had not made a request for enforcement did not eliminate the possibility that a request was received from somewhere else or something was received that the FER took to be a request. However, the possibility is hypothetical and speculative.

79 It also seems to be a remote possibility in view of the Department's Process Statement and the statement that no request for enforcement was made by the prosecuting authority. It is difficult to understand why the Department would advise that no request for enforcement was made by the prosecuting authority if the Department had made the Entry because it mistakenly thought that a request for enforcement had been made by the prosecuting authority.

80 I do not accept that this hypothetical, speculative and remote possibility meant that it was *unreasonable*, in the required sense, for the Commissioner to be unpersuaded that there were reasonable grounds to consider that enforcement documents existed within the scope of the Access Application.

81 Contrary to Mr Lee's submission, the Entry did not compel a conclusion that there must have been a request for enforcement (or any other enforcement documents for that matter).

82 First, it was dated four months after the fine had been paid. It is inherently unlikely that a request for enforcement would have been made after the fine had been paid.

83 Second, it was dated the same date that a court listing was vacated. The Commissioner knew that the FER had surmised that this would have triggered an update to the case in the system, but, because the fine had already been paid in full, it remained at 'Paid in Full' status. This

⁵⁰ ts 28.

⁵¹ See ts 22 - 23 and Appellant's Submissions [42].

supposition was supported by the fact that the same record in which the Entry appeared continued to show the status of the fine as 'Paid in Full'.

84 In my view, it was open to the Commissioner to fail to be persuaded, despite the Entry, that there were reasonable grounds to believe that enforcement documents existed.

The Newspaper Article

85 I am satisfied that the Commissioner did not have regard to the Newspaper Article in a meaningful sense. While she was clearly aware of it, she considered that it was not relevant to whether there were reasonable grounds to expect that further documents existed nor whether the agency had taken all reasonable steps to find those documents.

86 Mr Lee submits that the Newspaper Article was relevant in that it 'reinforces the inference that there must have been a request for enforcement for the Entry to have been made'. This is said to follow from a statement in the Newspaper Article alleged to be a quote from a spokesman for the FER. The alleged quote was 'The FER is unable to enforce a fine until the prosecuting authority makes a request to register the fine with FER for enforcement'. Mr Lee submits that the alleged quote goes further than the Process Statement in saying that, not only *would* FER not enforce until a request were made, the FER *is unable* to enforce without a request.⁵²

87 Mr Lee submits that the Process Statement can be understood as a statement about the way that the personnel in the FER deal with these cases and what it would take for a person to make the Entry. That is, Mr Lee submits that the Process Statement is a statement to the effect that registry personnel *would not* have made the Entry unless there had been a request from the prosecuting authority.⁵³

88 Mr Lee submits that the statement in the Newspaper Article raised the possibility that the computer system involved was set up so that there simply *could not* be that kind of entry in the system unless there had been a request made.⁵⁴

89 Even if the alleged quote is accepted as accurate, I do not accept that it adds significant weight to Mr Lee's contention that the

⁵² Appellant's Submissions [43].

⁵³ ts 16.

⁵⁴ ts 18.

Commissioner ought to have found there were reasonable grounds to believe that enforcement documents existed. In particular, I do not accept that the possibility that the computer system may have been set up in the way Mr Lee contends is a reasonable possibility.

90 First, it is pure speculation.

91 Second, it is inconsistent with the information provided by the Department to the effect that, although the Entry was present, there had not been a request for enforcement. There is no reason to doubt this information.

92 Third, it is inconsistent with the FER's supposition that the Entry had been automatically made by the system when the court listing was vacated. The Entry was dated the same day that the listing was vacated. Further, the FER's supposition was supported by the fact that the same record in which the Entry appeared continued to show the status of the fine as 'Paid in Full'.

93 Fourth, there is no reason to interpret the Process Statement in the manner contended. The Process Statement was *not* that registry personnel *would not have made the Entry* unless there had been a request from the prosecuting authority. It was that *enforcement action would not have been commenced* without a request from the prosecuting authority. The alleged quote in the Newspaper Article similarly related to enforcement action, not the Entry.

94 In any event, there was no suggestion that the Commissioner discounted the significance of the Entry because of the risk that a registry person may have mistakenly made the Entry without a request having been made. From the Commissioner's reasons as a whole, she discounted the Entry because the fine had been paid in full and no request had been made for enforcement, not because the Entry might have been made as a result of human error. The Commissioner implicitly accepted the FER's supposition to the effect that the Entry had been automatically made by the system when the court listing was vacated.

Conclusion on ground 2(b)

95 For these reasons, ground 2(b) fails.

**Did the Commissioner take into account an irrelevant consideration?
(ground 3)**

96 Mr Lee accepts that the Commissioner was correct in stating that the fine was paid in full. However, he submits that this does not mean that a request for enforcement could not have been received. Mr Lee submits that the fact of payment was irrelevant to the question of whether an enforcement request was made.

97 I accept that a prosecuting authority may make a request for enforcement before a fine is paid. I also accept that a prosecuting authority may make a request for enforcement shortly after a fine is paid, having not yet found out that it had been paid when it initiated the request. Neither of these is a reasonably possible explanation for the Entry. The Entry appeared to have been made on 2 October 2015. The fine was paid four months earlier.

98 I also accept that it is conceivable that a prosecuting authority may erroneously seek enforcement because it mistakenly believed a fine had not been paid. However, in my view it would not be unreasonable to discount this speculative and improbable scenario.

99 I do not accept that the payment of the fine is irrelevant to whether an enforcement request was made. As a matter of logic, it would be reasonable to infer that, once a fine had been paid, it is highly unlikely that a request for enforcement would be made. In my view, it is a plainly relevant consideration.

100 In oral submissions during the hearing, Mr Lee's counsel refined the argument somewhat. He submitted that it was unreasonable for the Commissioner to begin with the premise that, given the fine had been paid, a request *ought not* to have been made, and infer from that premise that a request *had not* been made. He submitted this was fallacious reasoning from an 'ought' to an 'is', and said this type of reasoning had been criticised by the philosopher David Hume.⁵⁵

101 Even disregarding the fact that Hume was discussing moral philosophy, Hume's criticism was about reasoning from an 'is' to an 'ought', not from an 'ought' to an 'is'.

102 It is not, in my view, necessarily logically fallacious to reason from an 'ought' to an 'is', depending on the circumstances and the standard of satisfaction required. A simple illustration is to begin with

⁵⁵ ts 24 - 25.

the premise that, if a person is given a flu shot, the person ought not to request a second flu shot the same day. If the premise is accepted, it would be open to infer, on the balance of probabilities, that, if a person had been given a flu shot, the person did not request a second flu shot the same day.

103 In any event, I am not satisfied that the Commissioner reasoned in the manner alleged. That is, I am not satisfied that the Commissioner reasoned that, given the fine had been paid, a request *ought not* to have been made, and therefore a request *had not* been made.

104 In the Final Decision, the Commissioner relied on her reasons in the Preliminary View Notice. In the Preliminary View Notice, the Commissioner referred to what had been recorded in the Department's Decision, including that no request by the prosecuting authority was made for enforcement of the fine. The Commissioner wrote:

In the circumstances of this matter, I understand that you paid the amount of the fine and costs imposed by the court on Kingsfield Holdings in full, on 4 June 2015. Accordingly, no request to enforce payment of the fine was received from the Department of Health because the fine was paid by you, on behalf of Kingsfield Holdings, in full. The agency submits that, on the basis the fine and costs had been paid in full, the matter was concluded.

Having considered all of the material before me including the submissions made by the agency and you, I am not persuaded that there are reasonable grounds to believe that further documents within the scope of your access application exist.

105 The second sentence of the first paragraph, taken on its own, does suggest that the Commissioner reasoned that, because the fine had been paid in full, no request to enforce payment had been made. However, on a fair reading of the Commissioner's reasons in their overall context, I am not satisfied that this was the Commissioner's reasoning.

106 The first sentence of the first paragraph uses the phrase 'I understand that', suggesting this was information that had come from the Department. The third sentence of the first paragraph uses the phrase 'The agency submits that'. The *second paragraph* is the Commissioner's conclusion.

107 From this, I infer that the second sentence of the first paragraph was, like the sentences surrounding it, based on the information she had received. In my view, the Commissioner did not reason in the manner

alleged. Rather, one of the circumstances the Commissioner took into account was the fact that, as advised by the Department, the prosecuting authority had not made a request for enforcement. In the second sentence of the first paragraph, the Commissioner was referring both to this fact and to *the Department's explanation as to why* the prosecuting authority had not made a request for enforcement.

108 I reject ground 3 in its terms. The fact that the fine was paid was not irrelevant. I also reject the modified version of ground 3 advanced orally. I am not persuaded that the Commissioner reasoned in the manner alleged.

Conclusion

109 Under s 70 of the Act, the Commissioner may obtain information from such persons and sources, and make such investigations and inquiries, as the Commissioner thinks fit. The Commissioner is not bound by rules of evidence.

110 The Commissioner had information to the following effect:

1. enforcement action by the FER for a fine of this type would only commence at the request of the prosecuting authority (and, if the alleged quote in the Newspaper Article was accurate, the FER is unable to enforce without a request);
2. no request had been made by the prosecuting authority for enforcement;
3. the fine had been paid in full on 4 June 2015; and
4. the Entry recorded 'Re-start enforcement process 02 Oct 2015 07:32 PM'. There was a court listing on 2 October 2015 which was vacated by consent, and it was surmised that this would have triggered the Entry. The Entry did not alter the status of the fine in the system as having been 'Paid in Full'.

111 I am not satisfied that the Commissioner's decision was unreasonable. It was open to the Commissioner to conclude that there was no substance in Mr Lee's complaint.

ARCHER J

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

SW

Associate to the Honourable Justice Archer

31 MARCH 2020